

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**

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State of Oklahoma, et al.,	)	
	)	
	)	05-CV-0329 GKF-PJC
Plaintiffs,	)	
v.	)	<b><u>THE CARGILL DEFENDANTS’</u></b>
	)	<b><u>RESPONSE TO PLAINTIFFS’ MOTION</u></b>
Tyson Foods, Inc., et al.,	)	<b><u>TO COMPEL DISCOVERY SEEKING</u></b>
	)	<b><u>FINANCIAL INFORMATION</u></b>
Defendants.	)	
	)	

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Defendants Cargill, Inc. and Cargill Turkey Production, LLC (“CTP”) (together, the “Cargill Defendants”) oppose Plaintiffs’ Motion to Compel the Cargill Defendants to Respond to Discovery Seeking Financial Information and their implied request for leave to serve a series of supplemental expert reports for their “Ability to Pay” punitive damages expert David Payne (Dkt. No. 1866). This Court should deny Plaintiffs’ requests because 1) the Court has already ruled that Plaintiffs are bound to their (now expired) expert deadlines, such that this motion is simply too late, and 2) the Cargill Defendants have already provided all the financial disclosure information required by Northern District of Oklahoma case law.

**BACKGROUND**

Cargill, Inc. and its wholly owned subsidiary Cargill Turkey Production, LLC are both privately held companies.<sup>1</sup>

In the early stages of this litigation, Plaintiffs served their July 10, 2006 set of discovery, which included Request for Production No. 107 seeking “all documents and materials reflecting, referring to or relating to your net worth.” In September 2006, the Cargill Defendants responded

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<sup>1</sup> Because both Mr. Payne’s damages report and Plaintiffs’ motion to compel focus on the parent company Cargill, Inc., the Cargill Defendants likewise focus this response on Cargill, Inc.

by, in part, objecting to Plaintiffs' Request No. 107 as overbroad and unduly burdensome (Dkt. Nos. 1866-2: Pls.' Mot. Compel Ex. A at 2 and B at 2-3.) The Cargill Defendants explained that the request also sought highly confidential and sensitive proprietary information, and represented that they would at an appropriate time (that is, closer to trial), produce information summarizing net worth. (See id.)

One year later, on September 13, 2007, Plaintiffs issued another request for financial information in their Request for Production No. 11, seeking "documents reflecting your financial statements for fiscal years 2002 to the present, as well as any other documents reflecting your net worth for fiscal years 2002 to the present." (Dkt. No. 1866-2: Pls.' Mot. Compel Ex. C at 2 and Ex. D at 2.) The request specified that it included, but was "not necessarily limited to, balance sheets, statements of income, statements of equity position, statements of cash flow, and all footnotes." (Id.) In November 2007, the Cargill Defendants objected to the request as duplicative of July 10, 2006 Request No. 107 (id.), to which the Cargill Defendants had already averred that they would answer with information summarizing net.

Nearly one year later, on October 24, 2008, Plaintiffs took up the issue again by agreeing to "narrow" their overbroad requests for financial information. (Dkt. No. 1866-2: Pls.' Mot. Compel Ex. E.) Through the early part of December 2008, the parties engaged in a meet-and-confer process regarding the scope of information the Cargill Defendants would produce in response to Request No. 107. (See, e.g., Ex. 1: Oct. 31, 2008 Ltr. from B. Jones.)

On December 4, 2008, Cargill, Inc. issued a supplemental response to Request No. 107. Contrary to Plaintiffs' assertion in their motion (Dkt. No. 1866 at 8), the Cargill Defendants did *not* label as confidential Cargill, Inc.'s financial response. It is in fact not confidential, and is attached here as Ex. 2. Cargill, Inc. provided Plaintiffs with the following financial information

for the previous five years:

- sales and other revenues
- net earnings
- specific 2005 and 2006 net earnings excluding The Mosaic Company, an entity in which Cargill, Inc. is the majority shareholder
- current assets
- net property and other assets
- total assets
- current liabilities
- net worth

(Id. at 6.) Likewise, on December 23, 2008, CTP provided Plaintiffs with the following unaudited financial information for each fiscal year of its existence, 2005 through 2008:

- sales and other revenues
- net earnings
- current assets
- net property and other assets
- total assets
- current liabilities
- net worth

(Dkt. No. 1866-2: Pls' Mot. Compel Ex. H, filed under seal.)<sup>2</sup>

The Court's Scheduling Orders required Plaintiffs to disclose their expert reports on damages by January 5, 2009. (Nov. 15, 2007 Ord.: Dkt. No. 1376.) Among Plaintiffs' January 5 disclosures was a report by Plaintiffs' "Ability to Pay" expert David Payne for each of the Defendant groupings. Mr. Payne's report regarding the Cargill Defendants opines on the ultimate amount of money yearly that Mr. Payne feels each entity has the "Ability to Pay" while remaining solvent. Mr. Payne reaches all of his conclusions based on the financial information that the Cargill Defendants produced to Plaintiffs in December 2008. (Dkt. No. 1866-2: Pls' Mot. Compel Ex. F, filed under seal.)

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<sup>2</sup> Plaintiffs failed to serve on the Cargill Defendants the information they filed under seal as Exhibits F and H in this matter. (Dkt. No. 1866-2.) Given the shortened timeframe the Court has adopted for this motion, the Cargill defendants are assuming that the documents filed under seal are accurate copies of the materials.

On January 29, 2009, Judge Frizzell denied Plaintiffs' requests for leave to serve additional rebuttal and supplemental expert reports for several of their liability experts. (Dkt. Nos. 1839 and 1842.) In denying Plaintiffs' motion to serve an additional supplemental expert report by Drs. Cooke and Welch, Judge Frizzell detailed the numerous extensions that Plaintiffs had already enjoyed in this case (Dkt. No. 1839 at 1-2), and discussed the fourteen supplemental and "errata" reports that Plaintiffs had served after those extended disclosure deadlines (see id. at 2).

The Court reiterated the statement in Magistrate Judge Sam Joyner's October 28, 2008 Order that "the right to supplement under Rule 26(e) is not without limits." (Jan. 29, 2009 Ord: Dkt. No. 1839 at 3.) The Court emphasized that "[a] supplemental expert report that states additional opinions or rationales or seeks to 'strengthen' or 'deepen' opinions expressed in the original expert report exceeds the bounds of permissible supplementation and is subject to exclusion under Rule 37(c)(1)." Id. (citing Palmer v. Asarco, Inc., 2007 WL 2254343, at \*3 (N.D. Okla. Aug. 3, 2007)). In denying Plaintiffs' motion to alter the Court's October 8, 2008 ruling barring rebuttal expert reports, the Court found that "[t]o alter the course previously plotted by the scheduling orders entered by the magistrate judge and permit rebuttal expert reports (and, presumably, sur-rebuttal expert reports) at this late date would unduly increase the cost of this litigation and delay its ultimate resolution." (Jan. 29, 2009 Ord: Dkt. No. 1842 at 2.)

On February 17, 2009 – six weeks after Plaintiffs served Mr. Payne's "ability-to-pay" punitive damages reports – Plaintiffs moved to compel the Cargill Defendants to disclose additional financial information that Plaintiffs argue Mr. Payne "will need to review upon receipt ..." (Dkt. No. 1866 at 8.) Mr. Payne's January 5 report, however, contains no caveat that he needs the additional Cargill financial information that Plaintiffs now seek in order to form his

opinions. (See Dkt. No. 1866-2 Ex. F, filed under seal.) Plaintiffs’ motion is labeled only as a motion to compel, but they admit that their purpose in seeking the additional financial information is for Mr. Payne to review it, and that they “anticipate[] ... requesting leave to supplement Mr. Payne’s expert report” regarding punitive damages. (Dkt. No. 1866 at 8.)

### **ARGUMENT**

The Court should deny Plaintiffs’ motion to compel and their indirect request for leave to supplement the several punitive damages reports of Mr. Payne. First, Plaintiffs cannot now – six weeks after the deadline for disclosure of their damage reports and less than two weeks before Defendants’ responsive deadline – demand additional discovery for the sole purpose of enhancing their expert reports on punitive damages. Second, the Cargill Defendants fulfilled their discovery obligations by disclosing numerous categories of financial information reflecting net worth over a period of several years.

#### **A. Plaintiffs Cannot At this Point Augment Mr. Payne’s Initial Expert Disclosure with the Additional Financial Information They Seek.**

The Court should deny Plaintiffs’ instant motion for several reasons. The motion seeks to compel additional discovery for the stated purpose of providing more information for their expert Mr. Payne, whose opinions Plaintiffs served six weeks ago. The discovery sought is thus in aid of an attempt either (1) to supplement an expert report after the disclosure deadline, (2) to finish an inherently “preliminary” report, or (3) to bolster the credibility of Mr. Payne’s existing opinions. None of these purposes is proper, and the Court should therefore deny Plaintiffs’ motion to compel discovery responses in support of such purposes.

As noted above, Judge Frizzell recently and clearly rejected Plaintiffs’ requests to issue yet more expert opinions in this matter. (See Jan. 29, 2009 Orders: Dkt. Nos. 1839, 1842.) Nonetheless, Plaintiffs assert that, should this Court grant their motions to compel additional

financial information, Plaintiffs intend to serve a series of supplemental reports for Mr. Payne. (Dkt. Nos. 1866 at 8 (Cargill Defendants); 1867 at 8 (George's Defendants) 1868 at 8 (Simmons Foods); 1869 at 7 (Peterson Farms).)

The Cargill Defendants respectfully submit that the Court has already determined that Plaintiffs' expert case is fully disclosed as is, and that Plaintiffs cannot attempt to provide addition supplementation now. Reopening Plaintiffs' damages expert case would necessitate modifying the entire remaining pretrial schedule. After Plaintiffs serve Mr. Payne's new reports at some unspecified future date, Defendants would need additional time to review his new opinions, depose him about those opinions, and prepare their own responses (expert or otherwise). These are exactly the sort of additional rounds of expert discovery that Judge Frizzell found "at this late date would unduly increase the cost of this litigation and delay its ultimate resolution." (Jan. 29, 2009 Ord: Dkt. No. 1842 at 2.)

It is unclear whether Plaintiffs intended from the outset to issue only preliminary expert reports on "ability to pay" with the intention to later augment and expend the reports with more financial information. Plaintiffs' instant motion seems to hold out the Payne reports as mere preliminary reports, with conclusions reached based only on partial information. (See Dkt. No. 1866 at 5-6, 8.) Indeed, the underlying report on the Cargill Defendants contains numerous placeholders where Mr. Payne notes that he would appreciate additional information. Notwithstanding these notations, Mr. Payne nevertheless contends that he is able to render a full opinion on the Cargill Defendants' "Ability to Pay" an assessment of punitive damages based on the information the Cargill Defendants provided in December 2008. (See generally Dkt. No. 1866-2 Ex. F, filed under seal; see also Dkt. No. 1866-2 Ex. J Payne Aff. ¶ 11 (noting that additional information like tax returns would be "relevant" to analysis).)

The Court should not permit Plaintiffs to serve expert reports on an intentional two-step track. Simply put, the Tenth Circuit Court of Appeals does not allow “preliminary” expert reports. Kern River Gas Transmission Co. v. 6.17 Acres of Land, 156 Fed. Appx. 96, 102 (10th Cir. 2005); Stone v. Deagle, 2006 U.S. Dist LEXIS 90430, at \*13 (D. Colo. Dec. 14, 2006). Moreover, even if a two-step approach were permissible, the Court’s Scheduling Orders required Plaintiffs to complete both steps *before* the damages expert deadline.

If, however, Plaintiffs instead contend that Mr. Payne’s initial punitive damage expert reports are complete as written, their present motion to compel amounts to an attempt to impermissibly bolster Mr. Payne’s opinions with additional information. Plaintiffs admit that they want this information so that Mr. Payne may perform “a fuller analysis.” (Dkt. No. 1866 at 5.) However, as this Court has recently held in another case:

A supplemental expert report that states additional opinions or rationales or seeks to “strengthen” or “deepen” opinions expressed in the original expert report exceeds the bounds of permissible supplementation and is subject to exclusion under Rule 37(c)(1). To rule otherwise would create a system where preliminary [expert] reports could be followed by supplementary reports and there would be no finality to expert reports, as each side, in order to buttress its case or position, could “supplement” existing reports and modify opinions previously given. This result would be the antithesis of the full expert disclosure requirements stated in Rule 26(a).

Cohlmia v. Ardent Health Servs., LLC, 2008 U.S. Dist. LEXIS 65292, at \*18-19 (N.D. Okla. Aug. 22, 2008) (internal quotations omitted).

In addition, Plaintiffs cannot now – six weeks after the expert damages report deadline – attempt for the first time to compel information to underpin their expert damages reports. If Plaintiffs truly believed that they both needed and were entitled to such detailed and far-reaching financial information as tax returns for their expert case, they bore the burden of moving to compel discovery of such information sometime between the time the dispute over the scope of

financial information first arose in September of 2006 and the date the expert damages reports were due on January 5, 2009. See Cont'l Indus. v. Integrated Logistics Solutions LLC, 211 F.R.D. 442, 444 (N.D. Okla. 2002) (“Failure to pursue a discovery remedy in timely fashion may constitute a waiver of discovery violations. Once, as here, a party registers a timely objection to requested production, the initiative rests with the party seeking production to move for an order compelling it.”) (internal citations omitted). Mid-February of 2009 is simply too late for Plaintiffs to raise this complaint with the Court.

In sum, Plaintiffs have put the cart before the horse. If Plaintiffs believe they can justify modification of the litigation schedule to extend the deadline for their expert damages reports, they should move for such relief openly and directly rather than tucking the issue into a motion to compel, and should have done so before the damages expert disclosure deadline passed on January 5. In such a direct motion, Plaintiffs could have offered the Court any “good cause” they might have had for such an extension, including the reasons they could not have pursued the desired financial information earlier in order to provide the resulting expert opinion within the Court’s existing schedule. Only if and when Plaintiffs might make such a showing and the Court would elect to extend the damages expert disclosure deadline would the issue of Plaintiffs’ discovery requests even become ripe. Here, however, Plaintiffs have not even attempted to make the required showing of good cause for such an extension.

The Court should deny Plaintiffs’ motion outright, and should instruct Plaintiffs that it will not permit additional damage reports by Mr. Payne.

**B. The Cargill Defendants Have Produced All Financial Information “Sufficient for Plaintiffs’ Needs.”**

Even if Plaintiffs could somehow justify to the Court a need to submit new expert reports at this late stage of the litigation, the Court should nevertheless deny Plaintiffs’ present motion to



compel because the Cargill Defendants have already provided Plaintiffs with all the required financial information. Although some discovery into a defendant's financial condition is permitted where punitive damages are alleged, the Northern District of Oklahoma has repeatedly held that a defendant must disclose only discrete balance sheets or financial information showing its net worth for discrete pertinent years. E.g., Cardtoons, L.C. v. Major League Baseball Players Ass'n, 199 F.R.D. 677, 686 (N.D. Okla. 2001) (one relevant year's balance sheet); Hightower v. Heritage Academy of Tulsa, Inc., No. 08-CV-602-GKF-FHM, 2008 WL 2937227, at \*1 (N.D. Okla. July 29, 2008) (balance sheet and net worth for current year only); Toussaint-Hill v. Montereau in Warren Woods, No. 07-CV-179 GKF/SAJ, 2007 WL 3231720, at \*1 (N.D. Okla. Oct. 29, 2007) (balance sheet showing net worth for a single year); City of Tulsa v. Tyson Foods, Inc., No. 01-CV-900-B(X), slip op. at 6 (N.D. Okla. May 3, 2002) (Dkt. No. 1866-2: Ex. I) ("documents reflecting [defendants'] net worth" for five years); see also Heartland Surgical Specialty Hosp., LLC v. Midwest Division, Inc., 2007 WL 950282, at \*14 (D. Kan. Mar. 26, 2007) (finding only the most recent and current financial information relevant to punitive damages determination and noting that "the issue is a party's 'financial condition' not their financial history"; cited with favor in Toussaint Hill). Even where a party specifically sought multiple financial documents (income statements, profit and loss statements, and cash-flow statements), as Plaintiffs do here, these courts refused and instead narrowly limited the disclosures required. See, e.g., Cardtoons 199 F.R.D. at 686 n.17; Toussaint-Hill, 2007 WL 3231720, at \*1. None of these decisions compelled the parties at issue to produce tax return information, as Plaintiffs demand here.

Here, the Cargill Defendants have provided Plaintiffs with five full years of financial summary information for Cargill, Inc., and financial summary information for CTP for every

year the company has existed. The Cargill Defendants provided information on 1) sales and other revenues, 2) net earnings, 3) current assets, 4) net property and other assets, 5) total assets, 6) current liabilities, and 7) net worth, plus additional specific Cargill, Inc. net earnings information for 2005 and 2006. (Ex. 2; Dkt. No. 1866-2 Ex. H, filed under seal.) The Cargill Defendants consciously composed these disclosures to provide information that is at least equivalent to the disclosures this Court ordered in the City of Tulsa case. See Dkt. No. 1866-2: Ex. I slip op. at 6. Moreover, these disclosures provide more financial information than the courts ordered in Cardtoons, Hightower, or Toussaint-Hill. See 199 F.R.D. 677, 686; 2008 WL 2937227, at \*1; and 2007 WL 3231720, at \*1. Because the Cargill Defendants have already provided Plaintiffs with more than enough financial information than is reasonably relevant to their punitive damages claims, this Court should deny Plaintiffs' motion to compel.

Despite these substantial disclosures, Plaintiffs now want more and seek "full financial statements" from the Cargill Defendants, including "income and cash flow, and the notes that are 'integral'<sup>3</sup> to the financial statements" plus "complete tax returns" without reference to date. (Dkt. No. 1866 at 5-6.) Plaintiffs' Motion does not acknowledge the Cardtoons and Toussaint-Hill holdings and essentially ignores the holding in Hightower, citing the case only for the proposition that some financial discovery is warranted where punitive damages are claimed – a point that the Cargill Defendants have never disputed. (See Pls.' Mot. Compel at 4-5; Dkt. No. 1866.) Further, Plaintiffs cite no legal support for their assertion that the Court should compel the Cargill Defendants' tax returns as somehow relevant to Plaintiffs' punitive damages claims. (See Pls.' Mot. Compel at 4-6; Dkt. No. 1866.)

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<sup>3</sup> The Cargill Defendants cannot identify the source for the Plaintiffs' quotation of the word "integral" in this passage. So far as the Cargill Defendants can determine, this is not a term they have used in this context.

Instead, Plaintiffs hinge their arguments on concluding comments in an Order by Magistrate Judge McCarthy in the City of Tulsa litigation. (See id. at 5.) In fact, that financial discovery Order carefully limited disclosure of financial information to only that which was “sufficient for the Plaintiffs’ needs,” namely, “documents reflecting [the defendants’] net worth” for a period of five years. City of Tulsa, slip op. at 6 (Dkt. No. 1866-2: Ex. I.) The Court left open the narrow possibility for the plaintiffs to compel further financial disclosures, but only should they prove it “**necessary** as the case progresses.” Id., emphasis added.

Plaintiffs have demonstrated no such necessity here. Plaintiffs argue that the financial information they now seek is “important and relevant information for a fuller analysis” by Mr. Payne. (Dkt. No. 1866 at 5; see also id. at 6.) Likewise, Mr. Payne’s Affidavit avers that the demanded information is “relevant to evaluating the financial condition, net worth and/or Ability to Pay of the Defendants” without distinguishing among the many Defendants in this case(not even between the public and private companies, who are very differently situated with respect to financial disclosure capabilities). (Id. at 5 (mistakenly citing Payne’s Aff. ¶ 10); Dkt. No. 1866-2 Ex. J ¶ 11.) Neither Plaintiffs nor Mr. Payne, however, represents that the additional financial information sought is necessary to this case, or even necessary to Mr. Payne’s opinions. (Plaintiffs merely argue that if they receive the information, Mr. Payne “would need to review it upon receipt.”) (Id. at 8.) Accordingly, the City of Tulsa Order does not save Plaintiffs’ motion.

Neither should this Court countenance Plaintiffs’ argument that the challenging state of today’s economy changes the rules of financial disclosure discovery in this District. Simply put, Plaintiffs have no legitimate reason to ascertain the “full picture of financial condition of any given company” in this litigation. (See Dkt. No. 1866 at 6.) To the contrary, as this Court has repeatedly held, Plaintiffs are entitled to balance sheet information reflecting net worth for a very

limited timeframe, and nothing more. See, e.g., Hightower, 2008 WL 2937227, at \*1. Further, Plaintiffs' arguments in their brief are contrary to the statements of Mr. Payne himself, who bases his entire "Ability to Pay" ultimate judgment for both of the Cargill Defendants on his view that Cargill, Inc.'s "2008 operating results are assumed to be within normal ranges and sustainable over time." (Dkt. No. 1866-2 Ex. F at 10, filed under seal.)

Finally, the Cargill Defendants take issue with Plaintiffs' and Mr. Payne's blanket, unsupported assertions about the ease and availability of the vast and varied financial information that Plaintiffs now seek. In particular, Plaintiffs' embellishment of Mr. Payne's generalizations about all "privately held companies like Cargill Inc." having the same financial information available is simplistic and false. (See Dkt. No. 1866 at 7, internal brackets omitted.) To note just one example, a single year's federal tax return for Cargill, Inc. fills approximately ten full bankers' boxes.

Because Plaintiffs seek far more than the narrow financial information relevant to a claim for punitive damages, this Court should deny their motion to compel.

### **CONCLUSION**

For all of these reasons, the Court should deny Plaintiffs' motion to compel and hold that Mr. Payne may not issue additional expert reports on damages.

Respectfully submitted,

Rhodes, Hieronymus, Jones, Tucker & Gable, PLLC

BY: /s/ John H. Tucker

JOHN H. TUCKER, OBA #9110

THERESA NOBLE HILL, OBA #19119

100 W. Fifth Street, Suite 400 (74103-4287)

P.O. Box 21100

Tulsa, Oklahoma 74121-1100

Telephone: 918/582-1173

Facsimile: 918/592-3390

And

DELMAR R. EHRICH

BRUCE JONES

KRISANN C. KLEIBACKER LEE

FAEGRE & BENSON LLP

2200 Wells Fargo Center

90 South Seventh Street

Minneapolis, Minnesota 55402

Telephone: 612/766-7000

Facsimile: 612/766-1600

ATTORNEYS FOR CARGILL, INC. AND CARGILL

TURKEY PRODUCTION, LLC

**CERTIFICATE OF SERVICE**

I certify that on the 23<sup>rd</sup> day of February, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General  
Kelly Hunter Burch, Assistant Attorney General  
J. Trevor Hammons, Assistant Attorney General  
Daniel Lennington, Assistant Attorney General

drew\_edmondson@oag.state.ok.us  
kelly\_burch@oag.state.ok.us  
[trevor\\_hammons@oag.state.ok.us](mailto:trevor_hammons@oag.state.ok.us)  
[Daniel.lennington@oag.ok.gov](mailto:Daniel.lennington@oag.ok.gov)

Melvin David Riggs  
Joseph P. Lennart  
Richard T. Garren  
Sharon K. Weaver  
Robert Allen Nance  
Dorothy Sharon Gentry  
David P. Page  
Riggs Abney Neal Turpen Orbison & Lewis, P.C.

driggs@riggsabney.com  
jlennart@riggsabney.com  
rgarren@riggsabney.com  
sweaver@riggsabney.com  
rnance@riggsabney.com  
[sgentry@riggsabney.com](mailto:sgentry@riggsabney.com)  
[dpage@riggsabney.com](mailto:dpage@riggsabney.com)

Louis W. Bullock  
J. Randall Miller  
Miller Keffer & Bullock Pedigo LLC

[lbullock@mkblaw.net](mailto:lbullock@mkblaw.net)  
rmiller@mkblaw.net

William H. Narwold  
Elizabeth C. Ward  
Frederick C. Baker  
Lee M. Heath  
Elizabeth Claire Xidis  
Fidelma L Fitzpatrick  
Motley Rice LLC

[bnarwold@motleyrice.com](mailto:bnarwold@motleyrice.com)  
lward@motleyrice.com  
fbaker@motleyrice.com  
[lheath@motleyrice.com](mailto:lheath@motleyrice.com)  
[cxidis@motleyrice.com](mailto:cxidis@motleyrice.com)  
ffitzpatrick@motleyrice.com

**COUNSEL FOR PLAINTIFFS**

Stephen L. Jantzen  
Paula M. Buchwald  
Patrick Michael Ryan  
Ryan, Whaley & Coldiron, P.C.

sjantzen@ryanwhaley.com  
pbuchwald@ryanwhaley.com  
pryan@ryanwhaley.com

Mark D. Hopson  
Jay Thomas Jorgensen  
Timothy K. Webster  
Gordon D. Todd  
Sidley Austin LLP

mhopson@sidley.com  
jjorgensen@sidley.com  
[twebster@sidley.com](mailto:twebster@sidley.com)  
gtodd@sidley.com

L Bryan Burns  
Robert W. George

bryan.burs@tyson.com  
robert.george@tyson.com

Michael R. Bond  
Erin W. Thompson  
Dustin R. Darst  
Kutack Rock LLP

michael.bond@kutackrock.com  
erin.thompson@kutackrock.com  
dustin.dartst@kutackrock.com

**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.;  
AND COBB-VANTRESS, INC.**

R. Thomas Lay  
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin  
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

**COUNSEL FOR WILLOW BROOK FOODS, INC.**

Robert P. Redemann  
Lawrence W. Zeringue  
David C. Senger  
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

rredemann@pmrlaw.net  
lzingue@pmrlaw.net  
dsenger@pmrlaw.net

Robert E. Sanders  
E. Stephen Williams  
Young Williams P.A.

rsanders@youngwilliams.com  
steve.williams@youngwilliams.com

**COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.**

George W. Owens  
Randall E. Rose  
The Owens Law Firm, P.C.

gwo@owenslawfirmmpc.com  
rer@owenslawfirmmpc.com

James M. Graves  
Gary V. Weeks  
Woody Bassett  
K.C. Dupps Tucker  
Bassett Law Firm

jgraves@bassettlawfirm.com  
gweeks@bassettlawfirm.com  
wbassett@bassettlawfirm.com  
kctucker@bassettlawfirm.com

**COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.**

John R. Elrod  
Vicki Bronson  
Bruce W. Freeman  
P. Joshua Wisley  
Conner & Winters, LLLP

jelrod@cwlaw.com  
vbronson@cwlaw.com  
bfreeman@cwlaw.com  
jwisley@cwlaw.com

**COUNSEL FOR SIMMONS FOODS, INC.**

A. Scott McDaniel  
Nicole M. Longwell  
Philip D. Hixon  
Craig Mirkes  
McDaniel, Hixon, Longwell & Acord, PLLC

[smcdaniel@mhla-law.com](mailto:smcdaniel@mhla-law.com)  
[nlongwell@mhla-law.com](mailto:nlongwell@mhla-law.com)  
[phixon@mhla-law.com](mailto:phixon@mhla-law.com)  
[cmirkes@mhla-law.com](mailto:cmirkes@mhla-law.com)

Sherry P. Bartley  
Mitchell Williams Selig Gates & Woodyard  
**COUNSEL FOR PETERSON FARMS, INC.**

[sbartley@mwsgw.com](mailto:sbartley@mwsgw.com)

Michael D. Graves

mgraves@hallestill.com

Dale Kenyon Williams, Jr.

kwilliams@hallestill.com

**COUNSEL FOR CERTAIN POULTRY GROWERS**

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

Thomas C. Green

Sidley Austin Brown & Wood LLP

1501 K Street NW

Washington, DC 20005

**COUNSEL FOR TYSON FOODS,  
INC., TYSON POULTRY, INC.,  
TYSON CHICKEN, INC.; AND  
COBB-VANTRESS, INC.**

s/ John H. Tucker